

2021 ADVANCED DUI TRIAL ADVOCACY

September 20 – September 22, 2021
Phoenix, Arizona



Wednesday, September 22, 2021

Second Samples and Independent Tests

Presented by:

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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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EXECUTIVE DIRECTOR

Independent Blood Testing

ADVISORY, 2ND BLOOD TUBE AND RELATED ISSUES



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GOVERNOR'S OFFICE OF HIGHWAY SAFETY

TRAFFIC SAFETY RESOURCE PROSECUTORS (TSRP)

- ▶ Beth Barnes, City of Phoenix Prosecutor's Office,
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- ▶ Jared Johnson, City of Scottsdale Prosecutor's Office,
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 - ▶ Prop. 207 Marijuana DUI

IF U GOT A PROBLEM

YO!!! I'LL SOLVE IT.



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What is Independent Blood Testing?

Commonly refers to two separate and distinct issues:

- 1) 2ND Tube or blood sample collected by police
- 2) An independent blood draw separate from the police draw

Typically, the officer will read a form that addresses both

- Access to the second tube/sample collected by the State for re-test
- Opportunity to collect an independent sample/draw

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DATE _____ CDP _____

0-111 BLOOD-DRAWING RESULTS/DESTRUCTION NOTICE

The results of your blood-drawing test will be available to you or your attorney thirty (30) days for blood or thirty (30) days for urine after the date of arrest. The test results can be obtained by contacting the Southern City Prosecutor's Office. The test results are to be provided to you and your attorney, and are not to be provided to anyone else. **DO NOT CONTACT THE HOSPITAL, as it will not respond.** If you intend to seek counsel of the hospital, **DO NOT CONTACT THE HOSPITAL, as it will not respond.**

After thirty (30) days for blood or thirty (30) days for urine, a laboratory which you or your attorney has chosen must cause a portion of the blood or urine drawn to the case to be independent analysis. The Southern City Prosecutor's Office will only release the results to your independent laboratory on request. The hospital **WILL NOT** be required to allow your attorney's attorney to view the results to be released to the laboratory you or your attorney could and is required to allow the independent of the laboratory which you have selected. In the Southern City Prosecutor's Office for destruction of the blood-drawing results to be destroyed. The independent laboratory will not be destroyed. If you or your attorney is not satisfied, request a portion of all independent analysis to be destroyed.

In compliance with the independent laboratory, your laboratory or the agent must present a "RESULTS" FOR FORTIFICATION OF THE BLOOD-DRAWING SAMPLE to the Southern City Prosecutor's Office. The Southern City Prosecutor's Office will only release the results to your independent laboratory on request. The hospital **WILL NOT** be required to allow your attorney's attorney to view the results to be released to the laboratory you or your attorney could and is required to allow the independent of the laboratory which you have selected. In the Southern City Prosecutor's Office for destruction of the blood-drawing results to be destroyed. The independent laboratory will not be destroyed. If you or your attorney is not satisfied, request a portion of all independent analysis to be destroyed.

In addition to the above written sample, you are also free to have your test drawn independently at a facility of your choosing for independent analysis.

A copy of this form was provided to the defendant.

Signature of Defendant	Signature of Officer
Southern Police Department 1000 E. Broadway Phoenix, AZ 85001 Phone: 602.448.1111 Fax: 602.448.1111 Property: 602.448.1111	Southern City Prosecutor's Office 1000 E. Broadway Phoenix, AZ 85001 Phone: 602.448.1111 Fax: 602.448.1111 Property: 602.448.1111

For Southern City Prosecutor's Office
1000 E. Broadway
Phoenix, AZ 85001
Phone: 602.448.1111
Fax: 602.448.1111
Property: 602.448.1111

Continuation: White Copy - (1st) Initial Yellow Copy - Defendant Purple Copy - (1st) Initial

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Common Misconceptions

Police must always inform defendants they have the right to collect an independent blood sample/independent draw

Police are required to collect a 2nd tube/sample for the defendant's exclusive use

The 2nd tube/sample belongs to the defendant and is accessible on demand

The State violates the defendant's rights if it uses blood from the 2nd tube; Testing from the 2nd tube renders the sample unusable for defense retest

Defendant has a right to immediate release upon demand to collect an independent test

Disclosing the availability of the 2nd tube of blood to the jury at trial is burden shifting

FALSE

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Second Tube / Sample

What is required?

Are police required to collect a 2nd tube/sample of blood?

Defense often cites to *Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979), arguing that police are required to collect a 2nd tube of blood. In *Baca*, breath was tested by an Intoximeter where one blows into a device and the sample is analyzed and consumed or it can be captured by a field collection unit and subsequently analyzed.

When requested, the police must take and preserve a separate sample for the suspect by means of a field collection unit. Not required in every case.

The suspect shall be told that the sample will be preserved for 7 days before it is destroyed.

If a suspect is clearly advised that a second sample of his breath will be taken and preserved for his use and he does not demand in writing that a sample be taken and preserved for him, he has waived the taking and preservation of the second sample.

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Second Tube / Sample What is required?

So, does *Baca* also require that police collect a second tube of blood for the defendant's exclusive use?



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Second Tube / Sample What is required?

Moss v. Superior Court, 175 Ariz. 348, 857 P.2d 400 (App.1993).

Replicate breath testing on an Intox. 5000

No second sample collection device. § 28-692 eliminated requirement to collect and preserve sample second sample of breath.

"Given the reliability and accuracy of replicate testing with an Intoxilyzer 5000, we do not believe that due process or fundamental fairness requires the state to provide defendants with breath samples. In light of the acknowledged technological development of the Intoxilyzer 5000, the focus inherently shifts from the breath sample to the machine itself and its proper operation for the due process debate to be relevant. We agree with the United States Supreme Court in *Trombetta* that defendants' due process rights are not violated by denying them independent samples, since defendants still have sufficient means of raising a meaningful challenge to the test results."

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Second Tube / Sample What is required?

Moss v. Superior Court, (cont'd)

The Intoxilyzer 5000 is a very accurate and reliable testing method with built-in safeguards. For these reasons we hold that due process does not require defendants to be provided with an additional sample when replicate breath tests are administered.

Due Process does not require the state to provide DUI defendants with a separate additional breath sample for independent testing when replicate tests on an Intoxilyzer 5000 are employed as prescribed by the DHS and DPS regulations.

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Second Tube / Sample What is required?

In *State v. Kemp*, 168 Ariz. 334, 336, 813 P.2d 315, 317 (1991), the Court declined to apply the *Baca* 2nd sample of breath requirement to blood samples.

Blood testing by gas liquid chromatograph, the method generally used by laboratories in Arizona and the method used in this case, usually does not consume or destroy the whole sample.

Blood, when properly stored and maintained, is still available for testing by the defendant at the time of trial.

Due Process, as applied to DWI cases, can have two standards – one for breath testing cases and one for blood testing cases.

At the hearing, the defendant failed to show that his blood sample was unavailable for independent testing.

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LEGAL ALERT

Failure to collect a second tube / sample of blood for the defendant's use does not violate Due Process

Requirement no longer applies in breath cases where it originated due to technological advancements.

The BAC technology today is at least as reliable, if not more so, than the Intox. 5000 discussed in *Moss*.

Even when required in breath cases, the requirement was not extended to blood cases.

Blood is different because there is typically sufficient sample for the defendant to retest.

But what if there isn't sufficient blood for the defendant to retest?

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Independent Blood Draw/Test Advisement

Are police required to inform a DUI suspect they can obtain an independent blood draw / test?

Montano v. Superior Court (Pima County), 149 Ariz. 385, 719 271 (1986).

Facts: Defendant arrested for DUI. South Tucson Police Dept. did not have a functioning intoxilyzer and no ability to test for BAC. Officer did not invoke implied consent and request a sample of breath, blood or urine. Defendant made offer of proof that he would testify that, if requested, he would have submitted to any test requested. Was not informed of his right to an independent test.

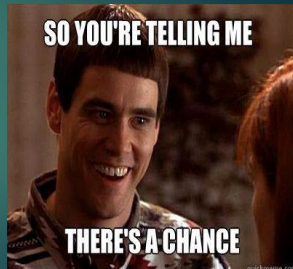
Holding: "When the implied consent statute is not invoked, it is important that DUI suspects be promptly informed upon arrest of their right to secure an independent alcohol test; and police must make every reasonable effort to facilitate a suspect's request."

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Montano holding is narrow and limited

Key aspects of the case

- Defendant under arrest for DUI
- Police did not invoke admin and there was no available means for a BAC test
- No sample was taken and available for retest
- Suspect not advised of right to obtain independent test



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Montano holding is narrow and limited

State v. Ramos, 155 Ariz. 153, 745 P.2d 601 (App.1987)

Facts: Ramos was arrested for DUI. The State invoked implied consent but Ramos refused the breath test. Ramos did not request an independent test and police did not inform he had a right to an independent test.

Holding: *Montano* holds only that the obligation by law enforcement to inform a suspect of his right to an independent test does not arise unless the state chooses not to invoke the implied consent law. These facts are not present in this case. The arresting officer asked Ramos to take a breath test, and he refused. Thus, the state invoked the implied consent law, and Ramos was afforded the opportunity to obtain scientific evidence, but waived that opportunity. Neither the holding or rationale in *Montano* dictate that Ramos must be told of his right to an independent test in this situation. Absent the unique conditions in *Montano* no Arizona court has ever held that a DUI suspect must be told of his right to an independent test.

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Montano is narrow and limited

State v. Ramos, 155 Ariz. 153, 745 P.2d 601 (App.1987)

Absent the specific circumstances in *Montano*, the state has no affirmative duty to inform a DWI suspect of his right to an independent test.

Failure of the officer to inform the DWI suspect of his right to an independent test does not constitute interference with the ability to get an independent test. Ramos was free to arrange for an independent test.

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Montano is narrow and limited

Scenario #1: Police arrive at the scene where the suspect fell off his motorcycle. The suspect is injured and shows signs of impairment. Due to the suspect's injuries, he is transported to the hospital. The officer contacts the suspect and observes additional signs of impairment. The officer applies for a search warrant which is granted by the Court and obtains blood samples drawn by hospital staff. The suspect is not arrested, implied consent is not invoked, no independent blood test advisory is provided.

Scenario #2: Defendant is investigated and arrested for DWI. Officer does not invoke implied consent, obtains a search warrant and collects two tubes of the suspect's blood. Officer does not provide an independent blood test advisory.

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Montano is narrow and limited

Scenario #1: *Montano* does not apply. Suspect is not arrested for DWI and there is blood sample available for the defendant to test.

Scenario #2: *Montano* does not apply. There is blood sample available for the defendant to test.

Montano: "The state's task is made easier when the state procures objective evidence of guilty or innocence, but when the state decides to forgo that evidence due process surely demands that the suspect be apprised of the opportunity."

Kemp: The rationale used in *Montano* is not present in a blood testing case because blood, when properly stored and maintained, is still available for testing by the defendant at the time of trial. This availability lessens the need for law enforcement officials to advise a DWI suspect that he may obtain, for independent testing, a portion of the blood sample being tested by the law enforcement agency.



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LEGAL ALERT

Absent the unique facts in *Montano*, police are not required to advise a suspect of their right to an independent blood test.

Considerations:

- Is there an arrest for DUI?
- Does the officer invoke implied consent and request breath/blood?
- Is the suspect offered an opportunity to provide breath and/or blood?
- Is there a blood sample available for the suspect to test?

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Right to an Independent Test

Although police are not required to advise the defendant of the right to an independent test, what happens if the defendant's make a request for an independent test?

A.R.S. § 28-1388(C): The person tested shall be given a reasonable opportunity to arrange for any physician, registered nurse or other qualified person of the person's own choosing to administer a test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

Courts have found that as a matter of Due Process, the State may not **unreasonably interfere** with an accused's reasonable attempts to secure, at his own expense, a blood or other scientific test for the purpose of attempting to establish evidence of sobriety.

Smith v. Coda, 114 Ariz. 510, 562 P.2d 390 (App.1977).

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Right to an Independent Test

A "portion of the same sample" is what the defendant receives from the State, whereas a "separate blood sample" is what the defendant receives from an independent blood draw. Due process guarantees a defendant a reasonable opportunity to obtain an independent blood draw even when the State has collected a blood sample and preserved a portion for inspection.

State v. Olcan, 204 Ariz. 181, 184, 61 P.3d 475, 478 (App. 2003).

Simply having blood available from the police draw is not sufficient if a defendant requests an independent draw and the State unreasonably interferes.

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Right to an Independent Test

If a defendant affirmatively requests a separate blood sample for independent testing, law enforcement officials may not interfere with his efforts to obtain such a sample.

State v. Kemp, 168 Ariz. 334, 337 n. 4, 813 P.2d 315, 318 n. 4 (citing *Amos v. Bowen*, 143 Ariz. 324, 327–28, 693 P.2d 979, 982–83 (App.1984)).



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Right to an Independent Test

- 1) Defendant must make a request / effort to collect an independent test
- 2) The State can't unreasonable interfere with defendant's ability to obtain independent test

Due Process Violation - Examples

Amos v. Bowen, 143 Ariz. 324, 693 P.2d 979 (App.1984): Officer volunteered to take the defendant to the hospital for a draw but was delayed by a couple hours when responding to an assault in progress call.

Be careful what you volunteer for.

McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982): Jail officials refused to honor defendant's request to telephone attorney to arrange for independent test.

Smith v. Coda, 114 Ariz. 510, 562 P.2d 390 (1977): Jail refused to allow defendant to contact his attorney and immediately secure bail, even though he had sufficient cash to post bail, for purpose of allowing him to obtain an independent blood test.

Smith v. Ganske, 114 Ariz. 515, 562 P.2d 395 (1977): Jail delayed attempts to post bail for defendant after he made repeated requests for release to arrange for an independent test.

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Right to an Independent Test

Common Scenario: Defendant under arrest for DUI requests to speak to an attorney and is given an opportunity. After speaking with an attorney, the defendant tells the officer 1) they will submit to the blood/breath test; 2) they invoke their right to remain silent; 3) they want to be released immediately to obtain an independent draw.

Now what?



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Independent Test is not a get out of jail free card

Van Herreweghe v. Burke ex rel. Cty. of La Paz, 201 Ariz. 387, 389, 36 P.3d 65, 67 (App. 2001)

Facts: Defendant arrested for DUI and Aggravated DUI. Defendant not released pursuant to the misdemeanor bail schedule because charged with a felony. Was advised of his right to an independent blood sample. Released the following afternoon.

Holding: Defendant is not entitled to immediate release to obtain a blood sample; Only wrongful denial of release may be unreasonable interference with an independent blood test

Defendant has reasonable means to obtain a blood sample short of release – can arrange at the jail “reasonable opportunity”
State cannot “unreasonably interfere”
Defendant’s lack of knowledge is not a barrier erected by the State
Police are not required to take the initiative or even assist in procuring evidence on the Defendant’s behalf
Difficulties of obtaining an independent test do not violate defendant’s rights if those difficulties are not created by the State

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LEGAL ALERT

Independent Blood Test is not a get out of jail free card

Officer and detention staff can continue with normal investigation and detention procedures but there should be no unnecessary delays.

Doesn’t restrict the Defendant from arranging an independent test at the jail.

Considerations:

Did the defendant make a request for an independent test?

Was the interference / barrier erected by the State?

Was the interference “wrongful”?

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Access to blood sample collected by the State

Second Tube of Blood – the defense does not “own” the sample but can access it.

Rule 15.1(e) Disclosure upon Request:

(1) Generally. Unless the court orders otherwise, the State must make the following items available to the defendant for examination, testing and reproduction no later than 30 days after receiving a defendant’s written request.

(A) any of the items specified in the list submitted under (b) (5)

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LEGAL ALERT

Defense does not have unconditional access to the State's blood evidence

Rule 15.1(e)(2) Conditions. The State may impose reasonable conditions, including an appropriate stipulation concerning chain of custody to protect physical evidence or to allow time for the examination or testing of any items.



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Other Scenarios

Defendant is a difficult draw and police are not able to collect a second blood sample in a separate tube

Crime lab needs to retest the sample and chooses to use the unopened 2nd tube

Only a small sample was collected and will be totally consumed by the State's analysis

State v. Lehr, 227 Ariz. 140, 254 P.3d 379 (2011); *State v. Goudeau*, 239 Ariz. 421, 372 P.3d 945 (2016) – testing that totally consumed DNA samples did not violate Due Process. But see *Kemp* which presumes that there is blood available for testing.

State v. Espinosa, CR 17-0001, 2018 WL 1281595 (App.2018) (Unpublished): No Due Process violation where State inadvertently destroyed blood sample. Defendant requested access five years to request retest of sample. Defendant advised right to independent test/draw.

Less than ideal circumstances do not result in Due Process violations. Due Process is the floor, not the ceiling. It is what is required at a minimum to preserve a fair trial/process.

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Other Scenarios

Considerations:

Is there a sufficient sample for retest. Just because the defense expert would prefer to test from an unopened tube or their protocol requires a larger sample for testing doesn't mean there isn't a sufficient sample for a retest.

Consider filing a notice with the Court, prior to testing, if one of these uncommon scenarios occurs.

Due Process does not require what is best or ideal, just fundamental fairness.

"There is probably no more nebulous and indefinable concept in the law than 'due process' of law. Generally speaking, the denial of due process is a denial of 'fundamental fairness, shocking to the universal sense of justice.'"

Oshrin v. Coulter, 142 Ariz. 109, 111, 688 P.2d 1001 (1984)



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Independent Test at TRIAL

Presenting evidence of independent testing at trial. Defense will argue burden shifting. What is burden shifting?

WHAT IT IS:

State v. Riley, 248 Ariz. 154, 174 459 P.3d 66, 86 (2020): "The State improperly shifts the burden when it implies a duty upon the defendant to prove his innocence or the negation of an element" of a charge, or "when it comments upon the failure of a defendant to testify or present a defense."

WHAT IT'S NOT

State v. Johnson, 247 Ariz. 166, 203, ¶ 149, 447 P.3d 783, 820 (2019). "A prosecutor may properly comment on a defendant's failure to present exculpatory evidence which would substantiate [the] defendant's theory, provided the remark is not a comment on the defendant's silence."

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Independent Test at Trial

State ex rel. McDougall v. Corcoran (Keen RPI), 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987):

Facts: Defendant arrested for DUI and BAC test administered (.14). Defendant requested that sample of breath be preserved which was collected. At trial the defense challenged the validity of the State's test results. The State presented evidence of the preserved sample, cross-examined the defendant about it and referenced it in closing argument.

Holding: A prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence.

"It strikes us as elemental fairness to allow the State to comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence."

Although the evidence of the defendant being furnished a sample was admissible, the purpose was limited to raising the inference that the nonproduction of any test results of the sample would be adverse to the defendant. It is NOT evidence of the defendant's consciousness of guilt.

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Independent Test at Trial

There are labs which will analyze blood samples for the defense

Locally, Michael Grommes (Blood Alcohol Testing & Consulting, LLC) is commonly used to test blood samples for the defense.

National Medical Service (NMS) Labs (and ChemoTox?) are additional options for testing blood samples.

Cross-Examine the defense experts on accessibility of Independent Testing of the blood sample
Not expensive-- about \$150

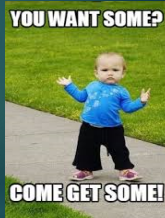
Compare to rates charged by defense expert's testimony

PRICE OF KNOWING YOUR BAC.....PRICELESS

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LEGAL ALERT

It is not burden shifting to present evidence and argument that the defense has access to evidence to support its claim that the State's BAC test is inaccurate, provided State does not comment on Defendant's silence.



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Common Motions

Motion alleging insufficient sample for defense retest (Due Process)

If there is little to no blood sample available for retest, typically it's the result of a difficult draw. The defendant's body limited the evidence collection, not police.

Michael Grommes (Blood Alcohol Testing & Consulting) typically testifies for the defense

Requires one milliliter of sample to test

Won't test from a tube already opened

Grommes' testing protocols are not the Due Process standard - It's possible to test?

Other labs will test a sample from a tube that was previously used for testing

Grommes will acknowledge that other labs are willing to test a sample even if he won't

State v. Woody, 173 Ariz. 561, 845 P.2d 487 (App.1992): State's criminalist testified she used only one milliliters of the four milliliters in the tube and that the sample would be good for several months. The defendant "offered no evidence that he ever attempted to have the sample tested and been unable to do so." No error in the trial court's refusal to suppress the results.

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Common Motions

Motion alleging insufficient sample for defense retest (Due Process)

Talk to your criminalist - what do they say about the testing the leftover sample? Could they retest the sample?

Consider having the criminalist present at the hearing and/or prepare an affidavit

Remember: Rules of Evidence 104(a) - the rules of evidence don't apply at the evidentiary hearing; No foundational requirements.

In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

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Common Motions

Motion alleging that defendant was denied opportunity to collect an independent blood draw (Due Process).

Typically the motion alleges that the Defendant was held in custody and wasn't released

Did the Defendant even make a request/effort toward collecting an independent sample? Were they wrongfully held after the request?

Attorneys routinely advise their clients to demand immediate release to collect an independent sample

But remember, a suspect isn't entitled to release from custody simply because they demand it. But State shouldn't unreasonably interfere with their request.

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Common Motions

Motion alleging that defendant was denied opportunity to collect an independent blood draw (Due Process).

Build a timeline to show the investigation and detention were routine and there were no extraordinary delays

Arrival at Jail – Completion of blood/breath collection – Conclusion of Investigation – Booking Process – Call for sober ride/wait time – Any delays to release caused by the defendant

Review OBC, Jail Video (if available), Detention Records

Consult the jail detention staff; possibly have them testify regarding detention procedures and timeframe

What efforts did the Defendant make to facilitate evidence collection at the jail?

Give the Court examples from cases which found Due Process violations and how they differ from your case. See Amos, Cada, Ganske

At the hearing, question the Defendant about what did after they were released from custody?

Typical Answer?

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GOVERNOR'S OFFICE OF HIGHWAY SAFETY

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